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The Committee of Consumer Services v. Utah Public Service Commission : Reply Brief

Utah Supreme Court

Reed Warnick; Assistant Attorney General; Attorney for Petitioner The Committee of Consumer Services; Michael L. Ginsberg; Ass\'t Attorney General; Attorney for Division of Public Utilities. Robert A. Peterson; Bendinger, Crockett, Peterson and Casey; Attorneys for Petitioners/Intervenors Crossroads Urban Center and Salt Lake Community Action Program; Gary Sackett; Jones, Waldo, Holbrook and McDonough; Attorneys for Questar Gas Company.

IN THE UTAH SUPREME COURT

THE COMMITTEE OF CONSUMER SERVICES, Petitioner, v. UTAH PUBLIC SERVICE COMMISSION, Respondent.	Case No. 20000893-SC PSC Docket No. 99-057-20 Priority14

REPLY BRIEF OF PETITIONER COMMITTEE OF CONSUMER SERVICES

ON PETITION FOR REVIEW FROM THE PUBLIC SERVICE COMMISSION

SANDER J. MOOY (#2309)
160 East 300 South, 4th Floor
P.O. Box 45585
Salt Lake City, Utah 84145-0585
Attorney for Respondent
Utah Public Service Commission

MICHAEL GINSBERG (#4516)
Assistant Attorney General
160 East 300 South, 5th Floor
P. O. Box 140857
Salt Lake City, Utah 84114-0857
Attorney for Respondent
Utah Public Service Commission

GARY SACKET
Jones, Waldo, Holbrook & McDonough
170 South Main Street, Suite 1500
Salt Lake City, UT, 84101-1644
Attorney for Intervenor Questar Gas

JONATHAN M DUKE, II
Questar Regulated Services Co. - Legal
180 East 100 South
P. O. Box 45360
Salt Lake City, UT, 84145-0360
Attorney for Intervenor Questar Gas

REED T. WARNICK (#3391)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0353
Attorney for the Petitioner
Committee of Consumer Services

ROBERT A. PETERSON
BENDINGER CROCKET PETERSON & CASEY
170 South Main, Suite 400
Salt Lake City, Utah 84101
Attorney for Intervenor Crossroads Urban Center

LIST OF PARTIES

Utah Public Service Commission, *adjudicating agency*

Questar Gas Company, *applicant*

Utah Committee of Consumer Services, *intervenor*

Utah Division of Public Utilities, *intervenor*

Intermountain Municipal Gas Agency, *intervenor*

Kern River, *intervenor*

Large Customer Group, *intervenor*

Utah Industrial Gas Users, *intervenor*

Magnesium Corporation of America, *intervenor*

Salt Lake Community Action Program, *intervenor*

Crossroads Urban Center, *intervenor*

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Telephone (801) 366-0353
Attorney for the Petitioner
Committee of Consumer Services

ROBERT A. PETERSON
BENDINGER CROCKET PETERSON & CASEY
170 South Main, Suite 400
Salt Lake City, Utah 84101
Attorney for Intervenor Crossroads Urban Center

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REPLY BRIEF OF PETITIONER COMMITTEE OF CONSUMER SERVICES

This is the Committee of Consumer Services' ("Committee") reply to the responses filed by the Public Service Commission of Utah ("Commission") and Questar Gas Company ("Questar Gas," "Company," or "utility") to the Committee's Opening Brief in this appellate proceeding.

INTRODUCTION

The Committee's appeal addresses the Commission's failure to analyze and make essential findings regarding Questar Gas' purported decisions and actions in resolving the coal seam gas problem, and the Commission's further disregard of critical facts in the record.[1] In the alternative, this appeal addresses the Commission's error in not dismissing

[1]The Commission has the duty to make "appropriate findings of fact to justify rate orders." *MCI Telecommunications v. PSC*, 840 P.2d 765, 773 (Utah 1992). See also *Milne Truck Lines Inc. v. Public Service Commission*, 720 P.2d 1373, 1378 (Utah 1986):

Questar Gas' application for failure to sustain its burden of proof in light of the Commission's finding that it could not determine that the Company's decisions leading to the gas processing remedy were not influenced by affiliate interests.

The Commission's response acknowledges the nature and prevalence of the affiliate interest and influence evidence disregarded in its August 11, 2000 Report and Order ("Order"). However, it still disregards the import of that evidence and further provides no justification for its failure to determine the nature or prudence of the purported gas processing decision or to hold the Company to its burden of proof.

The Company's response argues that this appeal is a battle over evidence the Commission considered in its decision. It avoids the Committee's arguments that the Commission failed to analyze and make requisite findings, or in the alternative, to hold Questar Gas to its burden of proof.

> The Commission cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. **It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions.** The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. **To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached.** (Emphasis added, ed.).

See also *Mountain States Legal Foundation v. Utah Public Service Commission,* 636 P.2d 1047, 1058 (Utah 1981), where this Court held: "In administrative matters such as this, there must be findings on all material issues."

This Committee reply will first address the factual record in light of the Commission and Company responses and will then address each response.

ARGUMENT

I. THE COMMISSION'S RESPONSE ACCEPTS THE COMMITTEE'S ACCOUNT OF THE RELEVANT FACTS IN THE RECORD

The Committee's Opening Brief identifies several facts, completely disregarded in the Commission's analysis and findings,[2] that identify the role Questar affiliate companies played in the management of Questar Gas, and the origin and resolution of the coal seam gas problem. They include the following:

1. Questar Pipeline secured the business of transporting Price-area coal seam gas by means of 'future capacity' contracts in the early 1990s, whereunder the coal seam gas producers agreed to transport their gas on Questar Pipeline's system in exchange for a Questar Pipeline commitment to expand its system to accommodate the growing quantities of coal seam gas both parties anticipated would be produced in future years.[3]

2. Questar Pipeline's transport of increasing quantities of Price-area coal seam gas conflicted with the interests and long-established gas supply requirements of Questar Gas and its ratepayers.[4]

3. Questar Gas is managed and controlled by a Questar parent company management group that also manages and controls Questar Pipeline.[5]

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[2]Committee's Opening Brief, pages 14-17.

[3]*Ibid.*, footnote 56 on page 31, and the discussion on pages 30-34.

[4]*Ibid.*, pages 24-34.

[5]*Ibid.*, pages 17-20.

4. All analyses in the record relating to the coal seam gas problem and the 1998 CO_2 Plant remedy were Questar parent company management group analyses that focused on Questar affiliate interests – not Questar ratepayer interests.[6]

5. The "decision" to process the coal seam gas by means of a CO_2 Plant owned and operated by Questar Pipeline was a Questar parent company management group decision.[7]

6. The "decision" that Questar Gas would procure gas processing services from Questar Pipeline's CO_2 Plant was a Questar parent company management group decision.[8]

7. Questar Gas *never* responded to the coal seam gas problem. Questar Pipeline had always assumed the responsibility of remedying any harm its transport of coal seam gas created for utility customers.[9]

These facts are recounted here because neither the Commission's nor the Company's response object to their inclusion in the Committee's Opening Brief. In fact, the Commission's response relies upon the Committee's Statement of the Case,[10] and

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[6]*Ibid.*, pages 20-22. Division witness Hanson testified that none of the analyses provided by the Company in response to discovery requests compared possible remedies "from the viewpoint of QGC and its customers. All were influenced by affiliate relationships." June 23, 1999 Rebuttal Testimony of Darrell S. Hanson, page 2. (Mr. Hanson's testimony is Addendum H to the Committee's Opening Brief.)

[7]Committee's Opening Brief, pages 18-21.

[8]*Ibid.*

[9]*Ibid.*, pages 25-27. See also the undisputed Company testimony on this point. Page 5 of the February 1, 1999 Prepared Testimony and page 8 of the April 26, 1999 Rebuttal Testimony of Company witness Alan K. Allred further describes the periodic remedies Questar Pipeline effected during the many years prior to 1998. The testimony of Mr. Allred is Addendum N1 to the Company's Response.

[10]Commission's Response, page 4.

acknowledges a record "fraught" and "tinged" with "affiliate transactions or interests" and "conflicts of interest."[11]

The Committee's Statement of Facts thus provides this Court an uncontradicted account "of the facts relevant to the issues presented for review,"[12] including the critical facts disregarded by the Commission. This reply will frequently refer to those facts in the discussion that follows.

II. THE COMMISSION NEVER ADDRESSES ITS FAILURE TO DETERMINE THE NATURE OR EXISTENCE OF THE COMPANY'S DECISION OR, IN THE ALTERNATIVE, ITS FAILURE TO DISMISS THE COMPANY'S APPLICATION FOR NOT SUSTAINING ITS BURDEN OF PROOF.

A. *The Commission's Inordinate Focus on the 'Result'*

The Commission's Response continues the rationale in its Order that burdens ratepayers with coal seam gas processing costs because of its finding that a utility "decision" "yielded the required result."[13] In the words of its response argument, "[p]ossible errors in utility decision making do not preclude recovery of costs incurred for a necessary and beneficial outcome."[14] As is obvious from the phrasing of its argument, the Commission's response also continues its Order's inordinate focus on the

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[11]Commission's Response, bottom of page 8, and top of page 12.

[12]Utah Rules of Appellate Procedure, Rule 24 Briefs, Section (7).

[13]Commission's Order, page 35.

[14]Commission's Response, page 6.

"outcome"or "result," to the neglect of the other foundational component in its rationale, the "*decision.*" In fact, its response never bothers to further identify or discuss the nature or magnitude of the "possible errors"covered by its sweeping argument statement. Yet, the nature – certainly the existence – of a "decision" is critical to any finding of culpability or cost responsibility in this case.

A *fait accompli* "required result" is often invoked in the service of interests other than those of the declared beneficiaries. While the continued safety of neighboring landowners may prompt the clean-up of an industrial spill, that does not prove the neighboring landowners made the decision, nor is it dispositive of who should pay. Similarly, just because coal seam gas processing may protect utility ratepayers does not mean their representative made the decision, nor does it mean utility ratepayers should pay for it.

The Commission's response argument phrase "[p]ossible errors in utility decision making" pastes over much of the underlying controversy in this case; including the issue whether there even was any "utility decision making". According to Questar Gas' own testimony, the *decision maker*[15] who decided coal seam gas processing was necessary was the same decision maker who in prior years decided other remedies were necessary to

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[15]As the Committee's Opening Brief makes clear, the 'decision maker' was the Questar parent company management group tasked with the responsibility of managing and controlling both Questar Gas and Questar Pipeline. See pages 9-10 and 17-20 of the Committee's Opening Brief.

protect utility customers from coal seam gas.[16] However, the Company's testimony describes those earlier decisions as Questar Pipeline decisions that implemented remedies at Questar Pipeline's cost and burden. What then, given the *same* decision maker, the *same* problem, the *same* necessary purpose, and the *same* Questar Pipeline ownership and control of the remedy, was so different about the "hat"[17] the decision maker wore the particular day it selected the gas processing remedy that made that one decision a 'Questar Gas' decision and not the 'Questar Pipeline' decision it had always been before? What other than after-the-fact assertion and assumption?[18]

Normally, in assigning cost recovery, a regulatory agency would examine not only the need for a course of action but also whether the analysis, selection, and other

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[16]February 1, 1999 Prepared Testimony of Alan K. Allred, Manager of Gas Supply Services for Questar Regulated Services Company, page 5. April 26, 1999 Rebuttal Testimony of Alan K. Allred, bottom of page 8. This testimony is included as Addendum N1 to the Company's Response.

[17]The analogy of proxy authority to a 'hat' is derived from the admission by Questar Gas' principal parent company management group witness that the utility was under parent company management control; specifically the following exchange (Committee's Opening Brief, pages 18-19):

> Q So in some sense, you wear two hats on occasion?
> A I have job responsibilities that deal with both Questar Gas and Questar Pipeline, so in common parlance, I guess that could be sporting two hats . . ."

[18]Even while acknowledging the Committee's and Division's position throughout both proceedings that the "decision" was not prudent (Order, pages 29 and 30), and the position of the Division, the Committee, and the Large Industrial Group that the decision was the result of the influence of affiliate interests (Order, pages 30 and 32), the Commission's Order never examines the purported Company decision.

"decision" steps to that end were reasonable and prudent. As the Committee's Opening Brief argues, given the affiliate concerns evident in this case, one would expect a rigorous examination of the 'utility' decision making steps by the Commission.[19] Instead, it side-steps that examination by posing a fictional either/or quandary: must it rule on the prudence of the "decision" or can it instead examine the "outcome?"

> [W]hether the contested CO_2 Stipulation resolves [this dispute] in a way that is reasonable and in the public interest . . . turns . . . on whether we must rule on the decision to enter the contract (whether prudent) or instead can examine the outcome of that decision (whether reasonable).[20]

Treating its statement of the quandary as sufficient discussion and answer, the Commission proceeds with an 'outcome' analysis, disregarding enroute several critical facts in the record that disclose the nature of the decision it nevertheless makes the keystone of its conclusion to burden ratepayers with CO_2 Plant costs:

> Clearly QGC has the burden to demonstrate the decision to enter the contract is a prudent one. Parties differ as to whether it did so successfully. But whether or not QGC met this burden, we can and do conclude that its decision to procure gas processing has yielded the required result, that is, it effectively protected the safety of its customers. This means the costs of gas processing can be legitimately recovered in rates.[21]

Unfortunately, and despite the undisputed factual record documenting the dual capacities and conflicting interests of the 'decision maker,' the Commission never

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[19]Committee's Opening Brief, pages 38-42. Affiliate interest and influence were constant subjects of witness testimony and concern from the very first day in both dockets.

[20]*Ibid.*, page 16.

[21]*Ibid.*.

discloses what bit of evidence enabled it to determine the "hat" the decision maker wore the day the "decision to procure gas processing" was made was a Questar Gas/Questar Gas ratepayers' hat and not a Questar Pipeline/Questar Corporation hat. It was certainly not looking at Division, Committee, or Industrial Group testimony concluding, in the words of the Manager of the Energy Section for the Division, that:

> In sum, after extensive review of information in this case and No. 98-057-12, the Division believes that . . . QGC's actions, or in-actions, appear to be influenced by affiliate relations more than the financial interests of its customers.[22]

The Commission's use of the term "decision to procure gas processing" thus appears to be nothing more than mere window dressing in its Order, along with other words like "burden" and "clearly" and "prudent" and "demonstrate." When examined, its Order legitimizes rate recovery on the basis of a "necessary and beneficial outcome" alone. The Commission's Response essentially says as much. It never identifies or evaluates the "possible errors in utility decision making"it posits,[23] be they errors in procedure or substance or Questar affiliates' evasion of established Questar Pipeline responsibilities. By analogy, even though the industrial company cleaned up its spill because it had a legal obligation to do so, the Commission would make neighboring landowners pay for the cleanup because it was beneficial for them.

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[22]*Ibid.*, page 27.

[23]Commission's Response, page 6.

B. The Commission's Hypothetical

The Commission's response poses a hypothetical set of circumstances "uncomplicated by affiliate transactions"[24] to try and demonstrate the correctness of a decision based on a factual record "fraught" and "tinged" with affiliate transactions, interests, and influence.[25] There are other uncomplicated facts in its hypothetical that limit its usefulness as well. For example, it posits the pipeline company's system could accommodate not only the initial quantities of high CO_2 content gas coming into production nearby, but also future increases in production. That, of course, is not so in this case, where the CO_2 Plant remedy was the direct result of increasing coal seam gas quantities flowing as a consequence of Questar Corporation's decisions to secure that business by expanding Questar Pipeline's system to accommodate those quantities.[26] The Commission's hypothetical posits the pipeline company determined the need to process the high CO_2 content gas and contracted for gas processing services, whereas the Commission based its decision in this case on the supposed fact that Questar Gas determined the need to process the coal seam gas and contracted for gas processing services. The Commission's hypothetical also posits the pipeline company initiated a rate proceeding before the FERC to include gas processing costs in its customer rates. While Commission Chairman Mecham's Dissent, and considerable testimony in the record,

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[24]Commission's Response, page 6.

[25]*Ibid.*, pages 8 and 12.

[26]Committee's Opening Brief, pages 30-34.

opine that is what should have happened,[27] this case arose out of Questar Gas' application to the Commission to include coal seam gas processing costs in the rates it charges captive ratepayers for gas service.

C. A Committee Hypothetical

To better illustrate the importance of the facts the Commission's Order and Response disregard, the Committee would like to pose a hypothetical of its own – one very much complicated with affiliate interests and influence:

Suppose the owner of a large company tasked a management group with the responsibility of managing two subsidiary companies. The management group's remuneration and further career opportunities depended upon the owner's satisfaction with how well the management group performed.

The one managed subsidiary is a public utility with statutory interests and duties the other subsidiary – an interstate pipeline company – does not share. The pipeline company transports the utility's gas supply, but has business interests the utility does not share – most notably a profitable growing business transporting high CO_2 content gas. To secure that business, the pipeline company earlier agreed with the gas producers to expand its pipeline to accommodate the increasing quantities of high CO_2 content gas both parties anticipated would require transport in the future.

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[27] *Ibid.*, page 7.

The pipeline company and the owner recognized from the beginning the high CO_2 content gas was incompatible with long-standing utility gas quality requirements. Because the pipeline company decided to transport the high CO_2 content gas in the same pipeline delivering the utility's gas supply, it made sure that transport did not harm the utility (or more importantly, the utility's customers) by periodically undertaking blending, back-hauling, and other remedial measures that kept the gas it delivered to the utility in compliance with the utility's established requirements. The pipeline's remedial measures were sufficient to cause the utility to take no action of its own to further protect its customers.

When the management group took over management of the pipeline and utility, it made sure the pipeline company continued any necessary remedies to ensure that the utility's gas quality requirements were met. However, it became apparent that the growing quantities of the high CO_2 content gas the pipeline company was transporting would soon exceed the efficacy of the remedies employed in the past to protect the utility's gas supply. The management group had the utility implement a program to lower its long-standing gas quality requirements to accommodate lower BTU content gas. However, such a program should have been initiated years earlier if it were going to solve the impending problem because it would be unduly expensive for utility representatives to visit, on a crash program basis, all utility customers in the state and modify the orifices in their gas appliances to efficiently burn lower BTU value gas. Lowering the utility's gas quality requirements only made economic sense if it were accomplished over time by

making sure that the new gas appliances which utility customers purchased to replace their old ones were set by the manufacturer to efficiently burn lower BTU gas. Thus, there was still the need for a quick fix until the long-term remedy of changing gas customers' appliances could be completed. The management group decided the pipeline company would have to process the high CO_2 content gas to make it more compatible with the utility's gas quality requirements. Accordingly, it had the pipeline company construct and operate a CO_2 plant to process the gas.

One troubling problem remained for the management group to solve. Remedying the harmful effects of the high CO_2 content gas on the utility's gas supply was a responsibility the pipeline company had assumed as a consequence of securing the business of transporting that gas, but the cost of this latest remedy would take a substantial bite out of the growing profits the management group wanted to demonstrate were a result of its management expertise. The management group eventually decided the owner's interests were best served if the gas processing costs were made a utility expense which could then be passed on to the utility's captive customers in the rates they pay for gas service. That arrangement not only resolved the problem in a way that protected the pipeline company's growing profits in gathering, storing, and transporting the high CO_2 content gas; it further created a new revenue-generating $20 million capital asset for the pipeline company. Accordingly, the management group had the utility contract with the pipeline company for gas processing services, thereby turning the pipeline company's gas processing obligation into a service the utility would thereafter pay it to perform. The

management group then had the utility apply to its state public service commission to pass its contract costs on to captive ratepayers and provided management group testimony to support the utility argument that the CO_2 Plant remedy and gas services contract were actually utility decisions taken to protect the interests of the utility and its captive ratepayers.

D. There Was no Prudent Utility Decision to Procure Gas Processing.

It is respectfully submitted that the Committee's hypothetical is a much better model with which to consider the rightness or wrongness of the Commission's analysis and findings. It reflects the affiliate control and conflict of interests present in this case. It also more accurately reflects the nature of the decisions that were made, who made them, and why.

Utility customers benefitted from coal seam gas processing, but protecting utility customers from the deleterious effects of coal seam gas was, and most essentially in this instance, an ongoing adjunct responsibility Questar Pipeline and Questar Corporation recognized and assumed when they secured the business of transporting increasing quantities of coal seam gas in the same pipeline that provided Questar Gas' gas supply. If Questar Pipeline had not assumed that responsibility in clearly identifiable ways in the preceding years leading up to 1998, then Questar Gas, for the better part of a decade, was recklessly inattentive to a growing serious harm to its customers.[28]

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[28]Committee's Opening Brief, footnote 54, page 29.

Either way, the purported decision in question does not support burdening ratepayers with CO_2 Plant costs. If it was a utility decision then, as a first response, it was woefully late and needlessly costly; and ratepayers should not be responsible for costs resulting from such neglect. If, on the other hand, it was a Questar Pipeline decision taken in furtherance of previously assumed Questar Pipeline responsibilities, the resulting costs are a Questar Pipeline responsibility, not a utility ratepayer responsibility.

E. If the Commission Could not Determine the Nature of the Decision, it Should Have Dismissed the Company's Application.

It goes without saying that ratepayers are not responsible simply because the gas processing remedy was more expensive or because they are captive customers of a utility monopoly and have no alternative for gas service. If the Commission could not determine which "hat" the decision maker wore because the Company did not meet its burden of proving the decisions in question were not influenced by affiliate interests, it was under a duty to dismiss the Company's application.[29] Given the factual record, its finding of a necessary and beneficial result is woefully short of the findings necessary to support assigning gas processing costs to ratepayers in this case.

F. Reply to Specific Statements in the Commission's Response

Statement 1: Whether the process of deciding to build and building the CO_2 processing plant was or was not improperly influenced by affiliate interests, does not avoid the fact that processing Coal

[29] *Ibid.*, pages 42-44.

> Seam gas was the only viable alternative permitting Questar Gas to continue to provide safe natural gas utility service to all its customers.[30]

Reply: The CO_2 Plant may have been the only viable alternative in the artificial time and fact vacuum the Commission created by disregarding facts that showed the long historical development of the problem. There were clearly other alternative solutions available over that longer developmental time span. For openers, as Commission Chairman Mecham observed, but for Questar Corporation's ownership of Questar Gas, one would have expected Quester Gas to "raise all sorts of Cain" upon learning that its pipeline gas supplier intended to start transporting gas that was incompatible with its customers' requirements.[31] More importantly, however, remedying the coal seam gas problem had always been a *Questar Pipeline responsibility*.[32] A prudent independent utility would have arguably taken steps to resolve the problem much earlier than 1998 had it determined its pipeline supplier was not adequately addressing the problem. Even if the CO_2 processing plant was "the only viable alternative" in1998, it was a remedy Questar Pipeline – not Questar Gas – determined, controlled, and should pay for.

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[30]*Ibid.*

[31]Committee's Opening Brief, footnote 54, on page 29.

[32]Committee's Opening Brief, top of page 12. See also the testimony of the Company's principal witness regarding the various remedies Questar Pipeline undertook during the many years prior to 1998 to remedy the coal seam gas problem its pipeline transport business created. February 1, 1999 Prepared Testimony of Alan K. Allred, Manager of Gas Supply Services for Questar Regulated Services Company, page 5. April 26, 1999 Rebuttal Testimony of Alan K. Allred, bottom of page 8. This testimony of Mr. Allred is included as Addendum N1 to the Company's Response.

Statement 2: No party contradicted Questar Gas evidence that, if Questar companies had not done so, other companies or the gas producers themselves would have constructed intermediate pipeline facilities which would then have brought the higher CO_2 content gas to the Questar interstate pipeline.[33]

Reply: While this statement may be true, it misses the essential fact. The quantities of coal seam gas that could have been accommodated in Questar Pipeline's system under those circumstances would never have produced the customer safety crisis that occurred in 1998.[34]

Statement 3: Processing to remove CO_2 was not necessary for any interstate market purposes; it was needed only to meet Questar Gas' uniquely high BTU and CO_2 content standards.[35]

Reply: Questar Gas is far and away Questar Pipeline's largest customer, controlling well over fifty percent of its reserve pipeline capacity. Whether or not its gas requirements were unique, they were long-standing requirements going back to the time when Questar Pipeline was an adjunct department within the public utility and its pipeline system was built for the purpose of transporting gas to the utility's distribution system.[36] There is nothing in the record to indicate that Questar Pipeline's obligation to deliver gas

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[33]Commission's Response, page 9.

[34]Committee's Opening Brief, pages 30-34.

[35]Commission's Response, page 10.

[36]Questar Gas' principal witness testified that the utility's gas BTU content requirement had been established "[f]or as far back as anybody working in the company can remember, or as far back as any records we could find." See footnote 16 on page 9 of the Committee's Opening Brief.

meeting Questar Gas' long-established requirements changed after Questar Pipeline began transporting Price-area coal seam gas. Quite the opposite; the record shows that after Questar Pipeline began transporting the incompatible coal seam gas, it continued to consider it a Questar Pipeline obligation to meet Questar Gas' established gas quality requirements by implementing periodic remedies in order to meet that obligation.[37]

Statement 4: From the Commission's view and determination, although it could not predict exactly what the FERC result would have been, the more persuasive evidence was that some cost responsibility would be assigned to Questar Gas, rather than no cost responsibility whatsoever . . . Based upon the record evidence, the Commission's acceptance of the [CO_2 Stipulation] represents an approximation of the likely cost recovery outcome that would have been required from Questar Gas and its customers for the benefits obtained from the only operational alternative that allowed continued, safe provision of service to all of Questear Gas' customers.[38]

Reply. There are several problems with this statement and the reasoning in the Commission's Order it refers to. Instead of looking to evidence in the record bearing upon the Company's *entitlement* to less than full recovery, the Commission considered what might have happened had a federal regulatory body (operating under different law, different factual circumstances, and with different parties and different arguments before it) resolved a Questar Pipeline petition to include the gas processing costs in question in the rates it charges pipeline customers.

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[37]See footnote 32, above, and the discussion to which it relates.

[38]Commission's Response, page 14.

The Questar parent company management group could have easily brought a Questar Pipeline action before the FERC, as Commission Chairman Mecham concluded they should have done years earlier.[39] They decided instead to effect their own remedy and cost allocation in a way, one must assume, that best reflected Questar affiliate pecuniary interests. They decided Questar Pipeline would own and operate the CO_2 processing plant but Questar Gas captive ratepayers would pay for it. They then had Questar Gas initiate these proceedings before the Commission. Having done so, the Questar management group invoked a proceeding where the decision would necessarily be based on Utah statutory law, administrative regulations, and case precedent. If Questar Pipeline ever brings an action before the FERC to include coal seam gas processing costs in the rates it charges its pipeline customers, so be it. That, however, is not the case before the Commission and should not be the basis for assigning cost recovery in this case.

Finally, if assigning CO_2 Plant costs to Questar ratepayers is illegitimate in the first place,[40] a compromise settlement (the CO_2 Stipulation the Commission accepted) that restricts rate recovery to something less than all costs is no less illegitimate and wrong. As the Opening Brief of Intervenors Crossroads Urban Center and Salt Lake Community Action Program effectively argues, the Commission has no authority to accept a

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[39]Committee's Opening Brief, page 11, footnote 11.

[40]The Commission determined that such costs could be "legitimately recovered in rates" based on the erroneous assumption that those costs were the result of a Questar Gas "decision." See Commission statement quoted in Committee's Opening Brief, page 16.

stipulated settlement in lieu of performing its statutory mandate of finding rate increases to be just and reasonable.[41]

III. THE COMPANY AVOIDS ADDRESSING THE LEGAL BASES OF THE COMMITTEE'S APPEAL.

As noted in the Introduction above, the Company's response attempts to recast the Committee's appeal into a "substantial evidence" test under Utah Code Ann. § 63-46b-16(4)(g). In so doing, it not only disregards the bases for appeal stated after each of the eight issues in the Committee's Statement of the Issues on Review but virtually all of the substance in the Committee's argument as well. The Committee believes the legal bases for its appeal are sufficiently and clearly set forth in its Opening Brief and otherwise addressed in its above reply to the Commission's response. Space will not allow a further reply to the Company's substantial evidence argument here.

A. Company's Assertions of Questar Decisions are Contradicted by the Record.

The Committee would here note that the Company avoids any discussion of the Commission's disregard of facts and failure to determine the nature and prudence of the Company's decision to procure gas processing by indulging in the same ruse or assumption manifest in the Commission's Order. It simply asserts that Questar "studied a variety of alternative possibilities,"[42] "adopted what was in its judgment the more

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[41]Opening Brief of Intervenors Crossroads Urban Center and Salt Lake Community Action Program, pages 8-9.

[42]Company's Response, page 11.

practical, cheaper, and far less uncertain solution to the problem,"[43] and "[t]o implement this result . . . entered into a gas-processing agreement . . . with a Questar affiliate."[44] As discussed above, such assertions contradict the factual record and cloak the evident issue raised by that record; namely, whether the controlling Questar management group's actions and decisions were taken on behalf of Questar Gas and its ratepayers or Questar Pipeline and Questar Corporation.

B. Reply to Specific Statements in the Company's Response

Statement 1: For purposes of this case, Questar agrees that the Commission cannot impose utility costs on ratepayers that were imprudently incurred. Not even the Committee has made the claim that the costs at issue were imprudently incurred.[45]

Reply: The Committee and Company at least both agree that the Commission cannot impose utility costs on ratepayers that were imprudently incurred. However, contrary to the Company's second sentence, the Committee does claim that the costs at issue were imprudently incurred.[46]

Statement 2: [T]he Committee's argument claims that the contract for services from the CO_2 plant violates the Commission's policies

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[43] *Ibid.*

[44] *Ibid.*, bottom of page 11.

[45] Company's Response, page 4.

[46] The imprudence of the costs and decision has been a consistent Committee position throughout both proceedings and on appeal. See, for example, the Commission's own view of the Committee's position on page 29 of its Order, and the Committee's Opening Brief, page 45.

> and the Court's interpretation of those policies . . . [This] issue was not preserved for appeal by the Committee.[47]

Reply: In a discussion faulting the Commission's "outcome" analysis, the Committee's Petition for Reconsideration quotes the Commission's own statement from its Order that, "[t]he most troubling question is whether the contract between QGC and its unregulated affiliate, QTS, was prudently entered." Given the Commission's standards and policies regarding affiliate transactions enunciated in such places as its1984 order conditionally approving Questar Corporation's ownership of the public utility, the Commission's statement clearly invokes those standards and the resulting issue of whether they were violated in the case of the gas processing services contract.

> Statement 3: The object of [the Committee's] suggestions is that the Commission did not explicitly declare the CO_2 processing agreement to have unequivocally been prudently entered into. But, this was an ancillary issue which, under the circumstances, did not require a direct answer.[48]

Reply: How so ancillary, and how so not require a direct answer? Even the Commission's Order declares that "[c]learly QGC has the burden to *demonstrate* the decision to enter the contract is a prudent one" (emphasis added, ed.).[49] Yet an examination of its analysis and findings discloses that the Commission studiously avoided any analysis of the decision – even its existence.

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[47]Company's Response, page 33.

[48]Company's Response, page 17.

[49]August 11, 2000, Report and Order, page 35. This Commission statement appears in context on page 16 of the Committee's Opening Brief.

Statement 4: Did the Commission 'abuse its discretion,' as delegated to it by the Legislature? Although there is some loose use of this phrase, Petitioners make no such direct claim or cite interpretive case law on the point. Oblique claims of abuse of discretion here are nothing more than Petitioners' dissatisfaction with the outcome.[50]

Reply: Abuse of discretion is a stated basis of appeal for five of the eight Issues on Review in the Committee's Opening Brief. It is, as the Company's response states, a basis specifically provided for in the law.[51] Underlying those enumerated instances of Commission abuse of administrative discretion is the Commission's further disregard of undisputed factual evidence in the record which bears directly on the identified issues. The responses of the Commission and Company both cite the case of *US West Communications v. Public Service Commission,* 901 P.2d 270, 274 (Utah 1995), holding that "the Commission's unexplained disregard of credible, uncontradicted evidence . . . was arbitrary and capricious and therefore warrants reversal." A further decision of this Court, cited in the *US West* case and in the Company's response, holds that "the law does not invest the Commission with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence."[52] Disregard by the Commission of uncontradicted, competent evidence is exactly what happened in these proceedings.

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[50]Company's Response, page 19.

[51]Utah Code Ann. § 63-46b-16(4)(h)(i).

[52]*Jones et al. v. California Packing Corp. et al.*, 244 P.2d 640, 644 (Utah 1952).

While in those cases characterized as arbitrary and capricious, such Commission action is inherently also an abuse of administrative discretion.

CONCLUSION

The Commission's Order approving the CO_2 Stipulation settlement never analyzed or determined the nature – or even the existence – of the purported utility "decision" it nevertheless cites as a basis for legitimizing Questar Gas' rate recovery of coal seam gas processing costs. It failed to make any such findings despite extensive evidence in the record disclosing who made the purported decision and why – evidence which the structure of analysis and findings in the Commission's Order show were completely disregarded by the Commission. That disregarded evidence shows beyond question that there was no utility decision to procure gas processing. Correcting the harm to Questar Gas' gas supply caused by Questar Pipeline's transport of Price-area coal seam gas was always a Questar Pipeline responsibility; and the Questar parent company management group decision to implement gas processing was therefore either a Questar Pipeline decision, taken in furtherance of previously established Questar Pipeline responsibilities, or a very untimely (late) and imprudent utility decision. In either case, it is not a decision that supports rate recovery of gas processing costs.

In the alternative, and to the extent the Commission did not address the nature and existence of the decisions in question because the Company failed to prove affiliate interests did not influence those decisions, the Commission had the legal duty to dismiss the Company's application for failure to meet its burden of proof.

In either alternative, the Commission's Order demonstrates reversible error and abuse of discretion in allowing coal seam gas processing costs into rates. The Committee petitions this Court to reverse *ab initio* the Commission's decision allowing CO_2 gas processing costs into rates in Docket Nos. 99-057-20, 98-057-12, and 01-057-14 – all three dockets having been consolidated in this appeal – and return this case to the Commission for implementation of this Court's reversal.

Respectfully submitted this 5th day of March, 2003.

REED T. WARNICK
Assistant Attorney General
Attorney for The Committee of Consumer Services

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY BRIEF OF PETITIONER COMMITTEE OF CONSUMER SERVICES** was mailed or hand-delivered first class this 5th day of March, 2003 to the following:

GARY A DODGE
FOR ENERGY STRATEGIES
HATCH, JAMES & DODGE
10 WEST BROADWAY, SUITE 400
SALT LAKE CITY, UT 84101

JONATHAN M. DUKE
CHARLES E. GREENHAWT
QUESTAR GAS COMPANY
180 EAST 100 SOUTH
P.O. BOX 45360
SALT LAKE CITY UT 84145

WILLIAM EVANS
PARSONS BEHLE LATIMER
ONE UTAH CENTER SUITE 1800
201 SOUTH MAIN STREET
SALT LAKE CITY UT 84111

MICHAEL L. GINSBERG
DIVISION OF PUBLIC UTILIES
160 E 300 S 5TH FLOOR
SALT LAKE CITY, UT 84111

SANDER J. MOOY
UTAH PUBLIC SERVICE COMMISSION
160 E 300 S
SALT LAKE CITY, UTAH 84114

HAROLD A RANDQUIST
INTERMOUNTAIN MUNICIPAL GAS
EAGLE GATE TOWER SUITE 1100
60 EAST - SOUTH TEMPLE
SALT LAKE CITY UT 84111

ROBERT REEDER
PARSONS BEHLE LATIMER
ONE UTAH CENTER SUITE 1800
201 SOUTH MAIN STREET
SALT LAKE CITY UT 84111

TONY J RUDMAN
MAGNESIUM CORP OF AMERICA
230 NORTH 2200 WEST
SALT LAKE CITY UT 84116

GARY G. SACKETT
JONES WALDO HOLBROOK &
MC DONOUGH
170 SOUTH MAIN STREET STE 1500
SALT LAKE CITY UT 84145

PATRICIA E. SCHMID
NORTHWEST PIPELINE / KERN RIVER
295 CHIPETA WAY
SALT LAKE CITY UT 84108

J. CRAIG SMITH
C/O NIELSEN & SENIOR
INTERMOUNTAIN MUNICIPAL GAS
EAGLE GATE TOWER SUITE 1100
60 EAST - SOUTH TEMPLE
SALT LAKE CITY UT 84111

BETSY WOLF
SALT LAKE COMMUNITY ACTION
764 SOUTH 200 WEST
SALT LAKE CITY UT 84101

Shayla Stapley